WORLD COURT DIGEST

Formerly Fontes Iuris Gentium

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the language of science
In memoriam
Carl-August Fleischhauer
1930-2005
Preface

The first three volumes of the World Court Digest cover the periods 1986 to 1990, 1991 to 1995 and 1996 to 2000. We are happy to issue the fourth volume, covering the period from 2001 to 2005. We hope that this new Digest will be welcome to all those interested in the case law of the International Court of Justice.

We are, of course, aware that nowadays the decisions of the Court are easily accessible through electronic data systems. However, there is no systematic analysis available in the form presented by the World Court Digest. Therefore, the Digest will be useful for those who wish to find the most recent position of the Court on a particular issue of international law. As the three previous volumes, also this fourth volume will be made available through electronic data on the homepage of the Max Planck Institute for Comparative Public Law and International Law.

The first five years of the new century have been a busy period for the Court due to its continuing heavy caseload. The cases concerned a variety of legal issues reaching from the use of force and self-defence to questions of land and maritime boundary delimitation, immunity, consular matters, revision of judgments and the effect of provisional measures. The parties to the cases were States from all parts of the world demonstrating the general acceptance of the Court.

The Digest has been prepared by a working group at the Max Planck Institute composed of Petra Minnerop, Karin Oellers-Frahm, Frank Schorkopf, Christian Walter and Annette Weerth.

The present volume will be devoted to the remembrance of Carl-August Fleischhauer, former Judge at the International Court of Justice.

Rüdiger Wolfrum Armin von Bogdandy

Directors of the Institute
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    Advisory Opinion of 9 July 2004

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1. THE FOUNDATIONS OF INTERNATIONAL LAW

1.1. Good Faith

LaGrand Case
(Germany v. United States of America)
Judgment of 27 June 2001

[p. 488] 60. The Court notes that it is not disputed that the LaGrands sought to plead the Vienna Convention in United States courts after they learned in 1992 of their rights under the Convention; it is also not disputed that by that date the procedural default rule barred the LaGrands from obtaining any remedy in respect of the violation of those rights. Counsel assigned to the LaGrands failed to raise this point earlier in a timely fashion. However, the United States may not now rely before this Court on this fact in order to preclude the admissibility of Germany's first submission, as it was the United States itself which had failed to carry out its obligation under the Convention to inform the LaGrand brothers.

1.2. Equity

Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria
(Cameroon v. Nigeria: Equatorial Guinea Intervening)
Judgment of 10 October 2002

[p. 443] 294. The Court is bound to stress in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court’s jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.

*  1.3. Estoppel and Acquiescence
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2.1.4. Ius cogens / obligations erga omnes

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, p. 136

[pp. 199-200] 55. The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.) The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the East Timor case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character" (I.C.J. Reports 1995, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

"Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the
Sources of International Law

United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ..."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ ...", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (I.C.J. Reports 1996 (I), p. 257, para. 79). In the Court’s view, these rules incorporate obligations which are essentially of an erga omnes character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an
obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

[pp. 231-232 S.O. Kooijmans] 39. Although the Court beyond any doubt is entitled to do so, the request itself does not necessitate (not even by implication) the determination of the legal consequences for other States, even if a great number of participants urged the Court to do so (para. 146). In this respect the situation is completely different from that in the Namibia case where the question was exclusively focussed on the legal consequences for States, and logically so since the subject-matter of the request was a decision by the Security Council. In the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the Namibia case is insufficient.

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations erga omnes. I must admit that I have considerable difficulty in understanding why a violation of an obligation erga omnes by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission’s Articles on State Responsibility. That Article reads:

"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. (Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.)

2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."

Paragraph 3 of Article 41 is a saving clause and of no relevance for the present case.
41. I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument’s sake I start from the assumption that the consequences of the violation of such obligations are identical.

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states "What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "co-operation ... in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court’s finding in operative subparagraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which - virtually without exception - take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination", the annexation of Manchuria by Japan and of Kuwait by Iraq, South-Africa’s claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.
45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the Namibia case, *I.C.J. Reports* 1971, p. 56, para. 125.)

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[pp. 349-350 S.O. Simma] 38. Let me conclude with a more general observation on the community interest underlying international humanitarian and human rights law. I feel compelled to do so because of the notable hesitation and weakness with which such community interest is currently manifesting itself vis-à-vis the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed "war" on international terrorism.

39. As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, "[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable ‘erga omnes’, since they may be regarded as the codification of accepted principles"¹. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports* 1996 (I), p. 257,
Sources of International Law

Similarly, in the *Wall* Advisory Opinion, the Court affirmed that the rules of international humanitarian law "incorporate obligations which are essentially of an *erga omnes* character" (*I.C.J. Reports* 2004, p. 199, para. 157).

40. As the Court indicated in the *Barcelona Traction* case, obligations *erga omnes* are by their very nature "the concern of all States" and, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports* 1970, p. 32, para. 33). In the same vein, the International Law Commission has stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts, that there are certain rights in the protection of which, by reason of their importance, "all States have a legal interest ..." (*A/56/10 at p. 278*)2.

41. If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.

* 2.1.5. Relation between the Sources of International Law

2.2. Customary International Law

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2 Concerning the specific question of standing in case of breaches of obligations *erga omnes* the Institute of International Law, in a resolution on the topic of obligations of this nature adopted at its Krakow Session of 2005, accepted the following provisions:

"Article 3
In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

Article 4
The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation."

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2.2.1. Formation of Customary International Law

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)
Judgment of 14 February 2002

[p. 21-22] 53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government’s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d’affaires are accredited.
54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

[pp. 144-145 D.O. Van den Wyngaert] 13. In the present case, there is no settled practice (usus) about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current\(^3\) or former Heads of State\(^4\) in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions\(^5\). Why this is so is a matter of speculation. The question, however, is what to infer from this "negative practice". Is this the expression of an opinio juris to the effect that international law prohibits criminal proceedings or, concomitantly, that Belgium is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an opinio juris. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical

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3 Cour de Cassation (Fr.), 13 Mar. 2001 (Qaddafi).

5 Only one case has been brought to the attention of the Court: Chong Boon Kim v. Kim Yong Shik and David Kim, Circuit Court (First Circuit, State of Hawaii), 9 Sep. 1963, 58 AJIL 1964, pp. 186–187. This case was about an incumbent Foreign Minister against whom process was served while he was on an official visit in the United States (see para. 1 of the “Suggestion of Interest Submitted on behalf of the United States”, ibid.). Another case where immunity was recognised, not of a Minister but of a prince, was in the case of Kilroy v. Windsor (Prince Charles, Prince of Wales), US District Court for the N.D. of Ohio, 7 Dec. 1978, International Law Reports, Vol. 81, 1990, pp. 605–607. In that case, the judge observes: “The Attorney–General ... has determined that the Prince of Wales is immune from suit in this matter and has filed a ‘suggestion of immunity’ with the Court ... [T]he doctrine, being based on foreign policy considerations and the Executive’s desire to maintain amiable relations with foreign States, applies with even more force to live persons representing a foreign nation on an official visit.” (Emphasis added.)
concerns and lack of extraterritorial criminal jurisdiction. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law.

[pp. 154-156 D.O. Van den Wyngaert] 27. ... In legal doctrine, there is a plethora of recent scholarly writings on the subject. Major scholarly organizations, including the International Law Association and the Institut de droit international have adopted resolutions and newly established think tanks, such as the drafters of the "Princeton principles" and of the "Cairo principles" have made statements on the issue. Advocacy organizations, such as Amnesty International, Avocats sans Frontières, Human Rights Watch, The International

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Federation of Human Rights Leagues (FIDH) and the International Commission of Jurists\(^{13}\), have taken clear positions on the subject of international accountability\(^{14}\). This may be seen as the opinion of civil society, an opinion that cannot be completely discounted in formation of customary international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions\(^{15}\). Well–known examples are the 1968 Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes against Humanity\(^{16}\), which can be traced back to efforts of the International Association of Penal law, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, probably triggered by Amnesty International’s Campaign against Torture, the 1997 Treaty banning Landmines\(^{17}\), to which the International Campaign to Ban Landmines gave a considerable impetus\(^{18}\) and the 1998 Statute for the International Criminal Court, which was promoted by a coalition of non–governmental organizations.

28. The Court fails to acknowledge this development, and does not discuss the relevant sources. Instead, it adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the – wrongly postulated – rule of immunity for incumbent Ministers under customary international law (Judgment,

\(^{16}\) Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 Nov. 1968, ILM 1969, p. 68.
\(^{18}\) The International Campaign to Ban Landmines (ICBL) is a coalition of non–governmental organisations, with Handicap International, Human Rights Watch, Medico International,
By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

2.2.2. Evidence of Customary International Law

2.3. Treaties

2.4. General Principles of Law

LaGrand Case
(Germany v. United States of America)
Judgment of 27 June 2001

A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

"the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79, p. 199).

Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented (see Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 106; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 142; Frontier Mines Advisory Group, Physicians for Human Rights, and Vietnam Veterans of America Foundation as founding members.

2.5. Unilateral Acts

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[p. 266] 293. The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 247-250, paras. 12-21). Similarly, the International Law Commission, in its commentary on Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts, points out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal" (ILC report, doc. A/56/10, 2001, p. 308). In the Court’s view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime.
[p. 568-569  D.O. Ajibola] 93. The Court agrees with Cameroon in that it does not accept the submission of Nigeria that the City States of Old Calabar have international legal personality. As far as Cameroon is concerned, this is a myth or a kind of mirage. It argues that the City States of Old Calabar cannot claim any international legal entity separate from the State of Nigeria. During the oral proceedings counsel for Nigeria argued about the City States of Old Calabar thus: "These City States were the holders of an original historic title over the cities and their dependencies, and the Bakassi Peninsula was for long a dependency of Old Calabar." (Ibid., Vol. I, p. 67 para. 5.2.)

94. Although Cameroon accepts that "[w]ithout doubt, Efik trading took place over a vast area of what is now south–eastern Nigeria and western Cameroon" (Reply of Cameroon, Vol. I, p. 247, para. 5.24), yet it asserts that there were other ethnic groups in that area of the Bakassi Peninsula, which at that time showed a "complex pattern of human settlement" (ibid., Vol. I, p. 247, para. 5.24).

95. In deciding whether the City States of Old Calabar is an international legal entity, one should look to the nature of the Treaty entered into between Great Britain and the Kings and Chiefs of Old Calabar in 1884. In the first place, this is not the first treaty of this kind signed by the Kings and Chiefs. As I have already mentioned, Great Britain signed altogether 17 treaties of this kind with the Kings and Chiefs of Old Calabar. Secondly, Great Britain referred to it not as a mere agreement, a declaration or exchange of Notes, but as a treaty – "Treaty with the Kings and Chiefs of Old Calabar, September 10, 1884" (Counter-Memorial of Nigeria, Vol. IV, Ann. NC–M 23, p. 109). How then could Great Britain sign a document, and call it a treaty if it were not so? It would have been described as an "ordinance" had it
been a document involving a colony of Great Britain. There is therefore no doubt that the City States of Old Calabar have international legal personality.

4.2. States

4.2.1. Jurisdiction of States

**Arrest Warrant of 11 April 2000**

*(Democratic Republic of the Congo v. Belgium)*

**Judgment of 14 February 2002**

[pp. 35 S.O. Guillaume] 1. [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.

[p. 51-52 D. O. Oda] 13. It is clear that a State cannot arrest an individual outside its territory and forcibly bring him before its courts for trial. In this connection, it is necessary to examine the effect of an arrest warrant issued by a State authority against an individual who is subject to that State’s jurisdiction to prescribe law.

The arrest warrant is an official document issued by the State’s judiciary empowering the police authorities to take forcible action to place the individual under arrest. Without more, however, the warrant is not directly binding on foreign authorities, who are not part of the law enforcement mechanism of the issuing State. The individual may be arrested abroad (that is, outside the issuing State) only by the authorities of the State where he or she is present, since jurisdiction over that territory lies exclusively with that State. Those authorities will arrest the individual being sought by the issuing State only if the requested State is committed to do so pursuant to international arrangements with the issuing State. Interpol is merely an organization which transmits the arrest request from one State to another; it has no enforcement powers of its own.

It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is
even some doubt whether the Court itself properly understood this, particularly as regards a warrant’s legal effect. The crucial point in this regard is not the issuance or international circulation of an arrest warrant but the response of the State receiving it.

[p. 60 S.O. Koroma] 5. Although immunity is predicated upon jurisdiction whether national or international it must be emphasized that the concepts are not the same. Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and the exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State. Accordingly, jurisdiction and immunity must be in conformity with international law. It is not, however, that immunity represents freedom from legal liability as such, but rather that it represents exemption from legal process. The Court was therefore justified that in this case, in its legal enquiry, it took as its point of departure one of the issues directly relevant to the case for determination, namely whether international law permits an exemption from immunity of an incumbent Foreign Minister and whether the arrest warrant issued against the Foreign Minister violates international law, and came to the conclusion that international law does not permit such exemption from immunity.

[pp. 61-62 S.O. Koroma] 8. ... in my view, the issue and circulation of the arrest warrant show how seriously Belgium views its international obligation to combat international crimes. Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.

9. Against this background, the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide. The Court did not rule on universal jurisdiction, because it was not indispensable to do so to reach its conclusion, nor was such submission before it. This, to some extent, provides the explanation for the position taken by the Court.